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DRAWING THE LINE: THE CIVIL COURTS' RESOLUTION OF CHURCH PROPERTY DISPUTES, THE ESTABLISHED CHURCH AND ALL SAINTS' EPISCOPAL CHURCH, WACCAMAW

I. INTRODUCTION

The constitutional separation of church and state presents problems for civil courts confronting church property disputes. “[W]hen rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.”¹ The recent litigation over the ownership of the property comprising All Saints Episcopal Church, Waccamaw (All Saints),² demonstrates this danger and the difficulty courts face in resolving such disputes.

This Note discusses the trial court’s errors in resolving the dispute—the constitutional error, the statutory error, and the error under common law principles governing real property. Part II addresses the constitutional limits on the civil courts’ power to adjudicate church property disputes, and the trial court’s error in its application of “neutral principles of law.” Part III discusses the nature of the “established church” in South Carolina from the Proprietary period to the end of the Revolutionary War. It also addresses the trial court’s error of ignoring the statutory scheme governing Church of England property. Part IV traces the All Saints property chain of title from the time of the Lords Proprietors to the present and questions the validity of using a newly-discovered 1745 Trust Deed to resolve the ownership dispute.

A. Background of the Case

The All Saints property lawsuit followed a series of rifts between the local congregation and its senior pastor, the Protestant Episcopal Church in the United States (National Church), and the Episcopal Diocese of South Carolina (Diocese).³ The National Church’s governing body has recently taken

1. Serbian E. Orthodox Diocese v. Milivojevic, 426 U.S. 696, 709 (1976).

2. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., No. 2000-22-720 (S.C. 15th Jud. Cir. Oct. 10, 2001) *appeal docketed*, No. 784-1890 (Dec. 20, 2001) (granting summary judgment for defendants).

3. “The Episcopal Church of the United States is a body of believers holding to a substantially similar creed and organized according to a structure which they believe is the true succession to the ministry of Jesus Christ. The Church is governed on the national level by a General Convention composed of a House of Bishops and a House of Deputies There are one hundred geographical dioceses in the United States, each presided over by a bishop, who is the ecclesiastical authority in the diocese. Each diocese is composed of congregations, generally

controversial theological and moral positions that have angered and disenfranchised many conservative, mainly Southern, congregations.⁴ The chief points of contention include a proposal to ordain openly gay men and women to the priesthood and a proposal to bless same-sex marriages.⁵ Existing church law provides for neither action.⁶

The “liberal” voices within the National Church have been pressing for the passage of these proposals into canon, and the bitter fight that has ensued threatens to divide the National Church.⁷ “Conservative” congregations throughout the country have attempted to “secede” from the National Church, hoping to take church assets with them.⁸ Most attempts have been unsuccessful in the courts. Episcopal canon expressly provides that all church property is held in trust for the local diocese and the National Church.⁹ In an effort to maintain the separation between church and state, as required by the U.S. Constitution, the civil courts have generally deferred to the ecclesiastical

known as ‘parishes’ or ‘missions,’ located in its geographic area. The Church is governed by a National Constitution and Canons. It is also governed by the Book of Common Prayer and its rubrics (i.e., ecclesiastical rules) as adopted by the General Convention in 1979.” Dixon v. Edwards, 172 F. Supp. 2d 702, 705-06 (D. Md. 2001).

4. See generally The American Anglican Council, at <http://www.americananglican.org> (containing various articles, press releases, and other information disseminated by the American Anglican Council). See also *AAC Reflects on General Convention*, at <http://www.americananglican.org/News/News.cfm?ID=48&c=2> (July 14, 2000); Rt. Rev. James M. Stanton, *We Are Called to Stay*, ENCOMPASS, at <http://www.americananglican.org/news/Newsprint.cfm?ID=90&c=3> (Fall 2000).

5. See Jeffrey H. Wilson, *Cathedral in Seattle Installs Episcopal Church’s First Openly Gay Dean*, EPISCOPAL NEWS SERVICE, at <http://www.episcopalchurch.org/ens/2000-34.html> (Feb. 18, 2000); *AAC Calls For New Tolerance of Former Homosexuals*, at <http://www.americananglican.org/News/News.cfm?ID=106&c=2> (Feb. 5, 2001); *AAC Denounces Decision by Episcopal Cathedral to Bless Same-Sex Unions*, at <http://www.americananglican.org/News/News.cfm?ID=43&c=2> (Sept. 29, 2000); *AAC Statement on Deputies’ Rejection of Same-Sex Blessings*, at <http://www.americananglican.org/News/News.cfm?ID=81&c=2> (July 11, 2000); Doug LeBlanc, *Activists Say Inclusion Is Not Enough*, at <http://www.americananglican.org/News/News.cfm?ID=62&c=2> (July 25, 1997).

6. See THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES, CONSTITUTION & CANONS (2000) [hereinafter CONSTITUTION & CANONS 2000].

7. See *AAC Applauds Formulation of New Anglican Commission-Views Move as Further Proof of Crisis in ECUSA*, at <http://www.americananglican.org/News/News.cfm?ID=111&c=2> (Mar. 1, 2001); LeBlanc, *supra* note 5.

8. The most recent attempts at secession involve churches in Morehead City, North Carolina and Mobile, Alabama. See Scott Nunn, *Judge Sends East Carolina Property Back to Jury Trial*, EPISCOPAL NEWS SERVICE, at <http://www.ecusa.anglican.org/ens/2001-204.html> (Aug. 2, 2001); James Solheim, *Dispute Over Historic Parish in Mobile, Alabama, Is Settled*, EPISCOPAL NEWS SERVICE, at <http://www.ecusa.anglican.org/ens/2001-136.html> (May 30, 2001).

9. CONSTITUTION & CANONS 2000, *supra* note 6, Title I, canon 7, § 4 provides: “All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.” Title II, canon 6, § 4 provides: “Any dedicated and consecrated Church or Chapel shall be subject to the trust declared with respect to real and personal property held by any Parish, Mission, or Congregation as set forth in Canon I.7.4.”

hierarchy's resolution of the dispute and have found express trust provisions of Episcopal church law dispositive. Therefore, the local Episcopal congregation forfeits its church property to the local diocese if it secedes from the denomination.

All Saints rector,¹⁰ Charles H. "Chuck" Murphy, III, is in the forefront of the recent battle within the National Church as a leader of conservatives seeking to withdraw from the denomination.¹¹ On January 29, 2000, Murphy severed his affiliation with the National Church after he was consecrated bishop overseas in Singapore without approval from his own diocesan bishop or the National Church hierarchy.¹² The "irregular" consecration made church headlines across the country and has been rejected by both the National Church and the Archbishop of Canterbury as illegal.¹³ Murphy was refused a seat in the House of Bishops but was permitted to remain a priest and serve All Saints as rector *emeritus*.¹⁴

Fearing Murphy would attempt to take All Saints and its property out of the denomination, the Diocese filed notice in the Georgetown public records on September 19, 2000 that All Saints property was "held in Trust for the Episcopal Church and The Protestant Episcopal Church in the Diocese of South Carolina."¹⁵ On September 27, 2000, All Saints changed its name to All Saints Parish, Waccamaw, removing the word "Episcopal" from its title.¹⁶ On October 17, 2000, All Saints filed new Articles of Incorporation¹⁷ and, on December 8, 2000, amended its Articles to change its name to All Saints Church, Waccamaw, Inc.¹⁸ All Saints also filed a Motion for Partial Summary Judgment in the Court of Common Pleas for the Fifteenth Judicial Circuit asking the court to vest legal title of its property in the heirs of George Pawley and

10. The rector is the senior pastor of an Episcopal congregation.

11. Murphy is the leader of First Promise, a network of conservative Episcopalians.

12. Kathryn McCormick & James Solheim, *Singapore Consecration Provokes Strong Response Throughout the Church*, EPISCOPAL NEWS SERVICE, at <http://ecusa.anglican.org/ens/2000-030x.html> (Feb. 18, 2000).

13. Brian Reid, *Event Coverage: The Singapore/ECUSA Consecrations*, at <http://anglicansonline.org.news/articles/2000/000214a.html> (Mar. 4, 2000). The Archbishop is the titular head of the worldwide Anglican Communion of which the National Church is a member.

14. *Id.*

15. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., No. 2000-22-720, slip op. at 7-8 (15th Jud. Cir. Oct. 10, 2001).

16. All Saints Parish, Waccamaw, Nonprofit Corporation Notification by Existing Corporation, State of South Carolina Secretary of State (Sept. 27, 2000), available at www.scsos.com.

17. All Saints, Waccamaw, Inc., Nonprofit Corporation Articles of Incorporation, State of South Carolina Secretary of State (Oct. 17, 2000), available at www.scsos.com.

18. All Saints, Waccamaw, Inc., Nonprofit Corporation Articles of Amendment, State of South Carolina Secretary of State (Dec. 8, 2000), available at www.scsos.com.

William Poole through a newly-discovered 1745 Trust Deed.¹⁹ The motion was granted, and the case is currently on appeal.²⁰

The property at issue consists of roughly fifty acres of prime real estate located on the Waccamaw Neck of Pawley's Island, South Carolina. All Saints maintained the disposition of its property turned not on canon law but on the 1745 Trust Deed.²¹ The 1745 Trust Deed conveyed legal title of the property from Percival and Anna Pawley to George Pawley and William Poole, as trustees, for the purposes of establishing a Church of England church.²² No subsequent deed purporting to convey the All Saints property from the trustees to the local church, the Diocese or anyone else has been located.²³ All Saints therefore argued sole ownership of the property rested in the heirs of the 1745 Deed Trustees.

On the other side of the dispute, the Diocese argued that, since All Saints was a hierarchical church, Episcopal Church constitutions and canons controlled the disposition of its property.²⁴ Under church law, All Saints property is held by express trust for the Diocese and the National Church.²⁵ The Diocese also argued that, since All Saints was an "established church" at the time of the 1745 conveyance, the court was required to review the 1706 Church Act, as well as English common and ecclesiastical law governing the disposition of church property, to construe any deed purporting to convey legal title of former Church of England property.²⁶

The Honorable John L. Breeden, Jr., applying "neutral principles of law," held that the 1745 Deed was unambiguous, the 1706 Church Act and church law were irrelevant, and Pawley's heirs alone held legal title.²⁷ The Order granting Summary Judgment to Pawley's heirs appeared to provide a way for All Saints to secede from the denomination and keep its property too, in direct contravention of governing church law.

19. George Rowe Townsend, a local resident, "discovered the 1745 Trust Deed in the Charleston County Courthouse" in 1986. *All Saints Parish*, No. 2000-22-720, slip op. at 6. Townsend has been researching the history of All Saints for 40 years. *Id.*

20. *See All Saints Parish*, No. 2000-22-720, *appeal docketed*, No. 784-1890 (Dec. 20, 2001).

21. *All Saints Parish*, No. 2000-22-720, slip op. at 6.

22. "[B]y a Deed dated July 20, 1745 (the Deed), Percival Pawley and his wife Anna Pawley deeded to George Pawley and William Poole 50 acres of land ' . . . in Trust for the inhabitants on the Waccamaw Neck for the use of a Chaple or Church for the divine worship of the Church of England.'" *Id.* at 4.

23. *Id.*

24. *Id.* at 8.

25. *Id.* at 7-8.

26. *See All Saints Parish*, No. 2000-22-720, slip op. at 8. The Diocese and National Church raised many other defenses outside the scope of this Note.

27. "I find that, according to the terms of the 1745 Deed, legal title was vested in George Pawley and William Poole as co-trustees . . . [and] joint tenants. When William Poole died in 1750, legal title . . . passed to George Pawley [W]hen George Pawley died in 1774, legal title to the property vested in his oldest son as the common law heir and, subsequently, continued to pass from generation to generation until the present day." *Id.* at 12.

B. Historical Context: All Saints As A Creature of Statute.

In order to analyze the current dispute, it is important to understand the unique history of the Protestant Episcopal Church in South Carolina of which All Saints has been a member for nearly 200 years. During the colonial period, Carolina was an extension of England. The Lords Proprietors, by royal charter, were bound to adhere to both English common law and ecclesiastical law in their colonization of the royal province.²⁸ Under the laws of England, the King of England was the Head of the Church, and the Church of England was the “established church” of the royal government.²⁹ Tax revenues were expended to erect, maintain and staff Church of England churches throughout the realm. No Church of England church was erected except by Act of Parliament.³⁰

By the letters patent, under which King Charles II granted the Lords Proprietors their lands, the Crown also granted power to appoint clergy and to set up an established church.³¹ The Lords Proprietors then granted the power to erect churches to their parliament, the Commons House of Assembly (Assembly).³² In 1706, the Assembly passed the Church Act empowering lay Church Commissioners to take up grants of land and draw on the public treasury to further the establishment and construction of Church of England churches throughout the colony.³³

From 1706 until 1778, the Church of England continued to be the “established church” of South Carolina.³⁴ During this time, the Assembly established the All Saints Parish³⁵ in May of 1767 in accordance with the provisions of the 1706 Church Act. Prior to its establishment as an independent parish, All Saints was established as a “chapel-of-ease”³⁶ for Prince George

28. See discussion *infra* Part III.

29. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 311-12 (Carl Stephenson & Frederick George Marcham eds., trans., 1937) [hereinafter SOURCES].

30. See discussion *infra* Part III.

31. GEORGE C. ROGERS, JR., CHURCH AND STATE IN 18TH CENTURY SOUTH CAROLINA 10-11 (Dalcho Historical Society 1959) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.).

32. *Id.*; see The Fundamental Constitutions of Carolina of Mar. 1, 1669, 1 S.C. STATUTES AT LARGE 53 (Thomas Cooper ed., 1836).

33. Act No. 256 of Nov. 30, 1706, 2 S.C. STATUTES AT LARGE 282 (Thomas Cooper ed., 1837).

34. Compare *id.* with S.C. CONST. of 1778, 1 S.C. STATUTES AT LARGE 137 (Thomas Cooper ed., 1836) (showing the 1706 Church Act established the Church of England and the 1778 S.C. Constitution disestablished religion).

35. During the colonial period, a parish was both an ecclesiastical and a political subdivision, much like today's counties where the local church served as the “town hall.”

36. A chapel-of-ease is “[a] chapel subordinate to a mother church, for the ease of parishioners in prayers and preaching They proved esp. useful . . . where distance and natural obstacles made attendance at the mother church difficult, if not impossible, for many parishioners.” THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 266-67 (F.L. Cross & E.A. Livingstone eds., 1990). A “chapel-of-ease” was an “auxiliary ministry [of a church] . . . for parishioners too far from the main building to attend services conveniently . . . [and for which] legislative permission was obtained.” See JAMES LOWELL UNDERWOOD, 3 THE CONSTITUTION OF

Winyaw, ministering to those who lived in the remote area of Waccamaw Neck on today's Pawley's Island.³⁷

During and after the Revolutionary War, the South Carolina Constitutions of 1778 and 1790 disestablished the Church of England, ultimately withdrawing public support for churches such as All Saints. Under the new constitutions, former Church of England congregations were permitted to keep their property.³⁸ During the Charleston conventions of 1806-1807, the former Church of England parishes reorganized statewide as "The Protestant Episcopal Church of South Carolina."³⁹ Local churches joining the new statewide organization agreed to adhere to the national body of the newly formed Protestant Episcopal Church in America.⁴⁰

For 200 years henceforth, All Saints has been an active, self-declared member of the Protestant Episcopal Church in the United States of America, adhering to its constitution and canons and submitting to the authority and control of the Diocese of South Carolina and its bishop.

II. THE CONSTITUTIONAL ERROR: "NEUTRAL PRINCIPLES OF LAW" AND THE ALL SAINTS ORDER

A. *Civil Courts' Power to Adjudicate Church Property Disputes and the First Amendment*

The First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁴¹ "[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."⁴² As a result, the U.S. Supreme Court has, over the years, delineated the constitutional limits on the civil courts' powers to adjudicate such matters.

Four key cases demarcate the "four corners" within which the court may properly make an inquiry: *Watson v. Jones*,⁴³ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,⁴⁴

SOUTH CAROLINA: CHURCH AND STATE, MORALITY AND FREE EXPRESSION 22 (1992).

37. HENRY DESAUSSURE BULL, ALL SAINTS CHURCH, WACCAMAW 3-4 (1949).

38. S.C. CONST. of 1778, art. XXXVIII, 1 S.C. STATUTES AT LARGE 137, 144 (Thomas Cooper ed., 1836).

39. GEORGE C. ROGERS, JR., THE HISTORY OF GEORGETOWN COUNTY, SOUTH CAROLINA 194 (2d ed. 1971); see also FREDERICK DALCHO, AN HISTORICAL ACCOUNT OF THE PROTESTANT EPISCOPAL CHURCH IN SOUTH-CAROLINA, FROM THE FIRST SETTLEMENT OF THE PROVINCE, TO THE WAR OF THE REVOLUTION (1820).

40. ROGERS, *supra* note 39, at 194.

41. U.S. CONST. amend. I.

42. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

43. 80 U.S. 679 (1871).

44. 393 U.S. 440 (1969).

Serbian Eastern Orthodox Diocese v. Milivojevich,⁴⁵ and *Jones v. Wolf*.⁴⁶ The four cases stand for the proposition that civil courts are constitutionally required to defer to the church hierarchy's determinations unless (1) the express terms of the instrument creating church property rights clearly resolve the dispute or (2) the hierarchy's determination was fraudulent, collusive or arbitrary. Importantly, civil courts may not (1) resolve underlying religious disputes nor (2) substitute their own judgments in place of the church hierarchy's as to what is a fair and right disposition.

In *Watson v. Jones* the Court was asked to resolve a dispute between two factions within the same congregation, each claiming exclusive use of the property owned and held by the local church.⁴⁷ The factions were bitterly divided over the issue of slavery following the Civil War, reflecting the division prevalent throughout the national church governing body.⁴⁸ One faction supported President Lincoln's Emancipation Proclamation and the abolition of slavery; the other faction sought to preserve slavery as a "divine institution."⁴⁹

The *Watson* Court set forth three general classifications of church property disputes. First, a dispute can arise when a written instrument expressly dedicates property to the spread of a religious belief.⁵⁰ Second, a dispute can arise where property is held by a "religious congregation" independent from any control of a general church organization.⁵¹ Third, a dispute can arise where property is held by a subordinate "religious congregation" subject to control of "superior ecclesiastical tribunals."⁵² If the express terms of an instrument affecting ownership are clear, the court can enforce its terms unless they violate public policy.⁵³ When there are no express provisions or presumably in cases of conflicting provisions, the court must examine the nature of the church organization to resolve the dispute.⁵⁴ Therefore, the church's own structure guides the court's determination as to whether an implied trust exists in favor of the general church organization.

Under *Watson* two main categories of churches are recognized: congregational churches and hierarchical churches. Congregational churches are self-governing and independent while hierarchical churches are governed and controlled by an ecclesiastical order or head.⁵⁵ To resolve disputes

45. 426 U.S. 696 (1976).

46. 443 U.S. 595 (1979). Many other Supreme Court cases address this question; however, these four key cases appear to lay out the basic rules governing hierarchical church property disputes.

47. 80 U.S. at 681.

48. *Id.* at 690-91.

49. *Id.* at 691.

50. *Id.* at 722.

51. *Id.*

52. *Id.* at 722-23.

53. *Watson*, 80 U.S. at 723.

54. *Id.* at 726-27.

55. 77 C.J.S. *Religious Societies* § 5 (1994).

involving hierarchical churches, the courts must defer to the church hierarchy's resolution in order to avoid interfering with its constitutional right to establish its own rules of church governance.⁵⁶ Ecclesiastical questions are questions over which the civil courts have no jurisdiction whatsoever.⁵⁷

The following rule of deference to ecclesiastical determinations announced in *Watson* became the bedrock of the Court's jurisprudence regarding church property disputes:

[T]he rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.⁵⁸

In the next key case, *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, the Court explained that, while the First Amendment limits the civil courts' role in adjudicating church property disputes, merely "opening the doors" to such disputes does not violate the First Amendment.⁵⁹ However, the First Amendment is violated when the courts seek to resolve questions of religious doctrine or practice.⁶⁰

In *Presbyterian Church* two Georgia churches tried to secede from the national denomination and retain ownership of church property.⁶¹ The congregations were angry over the national church's decisions to ordain women and to support the removal of Bible reading and prayers at public schools.⁶² Under Georgia law, ownership of church property turned on a civil jury's determination of whether the parent organization had abandoned or departed from the general church's "original tenets and doctrines."⁶³ The Court held Georgia's "departure-from-doctrine" test unconstitutional because it

56. *Watson*, 80 U.S. at 733-34.

57. *Id.* ("[W]here a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them, . . . no jurisdiction has been conferred on the tribunal to try the particular case before it . . .").

58. *Id.* at 727.

59. 393 U.S. at 449.

60. *Id.*

61. *Id.* at 441.

62. *Id.* at 442 n.1.

63. *Id.* at 443-44.

required the Court to engage in an improper analysis.⁶⁴ The Court had to determine whether the actions of the parent organization varied “substantially” from prior doctrine by interpreting church tenets.⁶⁵ Moreover, if a “substantial” departure were found, the Court decided whether the issue was of such importance that the implied trust in favor of the parent organization must be terminated.⁶⁶ Therefore, the test required a civil court to improperly determine matters at the “very core of a religion.”⁶⁷ “Plainly, the First Amendment forbids civil courts from playing such a role.”⁶⁸

There are a few exceptions to the limitations imposed on the court’s power to adjudicate church property disputes. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court clarified such a possible exception to the *Watson* rule of deference⁶⁹ first posited in the 1929 case *Gonzalez v. Roman Catholic Archbishop of Manila*.⁷⁰ In *Gonzalez* the Court had indicated a showing of “fraud, collusion or arbitrariness” might constitute grounds for civil courts to invalidate decisions made by church tribunals.⁷¹ However, *Serbian Eastern Orthodox Diocese* makes it clear that the fraud exception does not apply when the primary issue before the court is theological in nature, and the property dispute is merely a “peripheral” matter.⁷² “In such a situation even limited review of the church decision . . . could seriously harm free exercise of religion by substituting judicial orthodoxy for church doctrine.”⁷³

After forming the basic rules regarding the court’s *power* to adjudicate church property disputes, the Court faced the following question: What are the constitutionally permissible *methods* by which a civil court may resolve such disputes?

B. Constitutionally Permissible Methods for Adjudicating Church Property Disputes

1. “Neutral Principles of Law” Analysis

In *Jones v. Wolf* the U.S. Supreme Court held that “the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes.”⁷⁴ “[A] State may adopt *any* one of various

64. *Id.* at 449-50.

65. *Presbyterian Church*, 393 U.S. at 450.

66. *Id.*

67. *Id.*

68. *Id.*

69. 426 U.S. at 696-97.

70. 280 U.S. 1 (1929).

71. *Id.* at 16.

72. *UNDERWOOD*, *supra* note 36, at 160.

73. *Id.*

74. 443 U.S. at 602.

approaches . . . so long as it involves no consideration of doctrinal matters”⁷⁵

In *Jones* the local church was a member of a parent organization, The Presbyterian Church in the United States, that generally held to a hierarchical form of government.⁷⁶ Legal title of the property in dispute was held in the name of the local church and its trustees.⁷⁷ At a congregational meeting, 164 members of the congregation voted to separate from the parent organization and 94 members voted to stay.⁷⁸ The Georgia Supreme Court, having abandoned its “departure-from-doctrine” after *Presbyterian Church*, resolved the dispute by applying “neutral principles of law.”⁷⁹

Applying neutral principles of law, the Georgia court examined all relevant documents, civil and ecclesiastical, governing church property ownership. These documents included all deeds, state statutes governing implied trusts, and the Presbyterian Church’s own Book of Order.⁸⁰ The Georgia Supreme Court found nothing in any of the documents giving rise to a trust in favor of the parent organization and, therefore, awarded the property based on the legal title found in the local church and its trustees.⁸¹

In reviewing *Jones* the U.S. Supreme Court affirmed neutral principles of law as passing constitutional muster.⁸² However, since “neutral principles” required courts to examine church documents, “special care” had to be taken “to scrutinize the document in purely secular terms.”⁸³ The Court thought important that under neutral principles of law, the parties themselves could amend existing church documents and declare whether a trust existed in favor of the parent prior to the eruption of any dispute.⁸⁴ By modifying these documents, the parties could ensure that civil courts would “give effect to the result indicated by the parties.”⁸⁵

While the *Jones* Court held neutral principles of law as a constitutionally permissible method to resolve disputes, the case was nevertheless vacated and remanded.⁸⁶ The Court reasoned that, under Georgia law, hierarchical church property was required to be held according to the terms of the church

75. *Id.* (citing *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970)) (emphasis in original).

76. *Id.* at 597-98.

77. *Id.* at 597.

78. *Id.* at 598.

79. *Id.* at 600.

80. *Jones*, 443 U.S. at 600.

81. *Id.*

82. *Id.* at 602.

83. *Id.* at 604.

84. *Id.* at 606.

85. *Id.*

86. *Jones*, 443 U.S. at 610. On remand, the Georgia court affirmed, having adopted a “presumptive rule of majority representation.” “That presumption is overcome under Georgia law by an application of . . . ‘neutral principles of law’—that is, ‘state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination.’” *Jones v. Wolf*, 260 S.E.2d 84, 84-85 (Ga. 1979) (citations omitted).

government. Therefore, the Georgia courts were compelled to defer to the parent organization's determination of ownership because Georgia law provided that the "laws and regulations" of the parent determined the identity of the local church.⁸⁷

a. *South Carolina's "Neutral Principles of Law"*

South Carolina "neutral principles of law" jurisprudence pre-dates that of the U.S. Supreme Court. In *Watson v. Jones* the Court referred to the 1843 South Carolina case, *Harmon v. Dreher*,⁸⁸ as "[o]ne of the most careful and well-considered judgments on the subject" of the limits on the civil courts' power to resolve church property disputes.⁸⁹

The dispute in *Harmon* involved the rights of a minister, expelled from the church Synod, to use church property.⁹⁰ The expulsion of the minister divided the local church into two factions—one for and the other against the Synod.⁹¹ After much argument, both factions agreed to share the use of the church building for services.⁹² Services were to be conducted by two different ministers—one for the adherents and one for the detractors.⁹³ The sharing arrangement did not work, and the case ended up in court.

The *Harmon* court held:

The judgements . . . of religious associations, bearing upon their own members, are not examinable here Where a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide. The civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions, out of which the right arises, as it finds them.⁹⁴

The *Harmon* court applied neutral principles of law to resolve the matter. "Neutral principles" included "general principles of law, such as that which governs what is fair notice . . . and . . . the construction of the traditions and agreements which define the relationship of a constituent organization to its parent body."⁹⁵ Before it could be determined that the detractors had forfeited

87. *Jones*, 443 U.S. at 609.

88. 19 S.C. Eq. (2 Rich. Eq.) 87 (1843).

89. *Watson*, 80 U.S. at 730.

90. 19 S.C. Eq. (2 Rich. Eq.) at 115.

91. *Id.* at 115-18.

92. *Id.* at 117.

93. *Id.*

94. *Id.* at 120-21.

95. UNDERWOOD, *supra* note 36, at 147. Professor Underwood notes that even though the court applied neutral principles, "the trial judge, whose opinion was adopted by the appellate court, could not resist frequent asides concerning the conduct of some of the parties as being inappropriate for Christians." *Id.*

the church property, it must be found that they seceded from the Synod.⁹⁶ The court held the detractors had not seceded from the Synod, so the case was dismissed.⁹⁷ *Harmon* thus established neutral principles of law as the proper approach for resolving church property disputes in South Carolina. Two subsequent South Carolina cases further defined the appropriate “neutral principles” analysis to be applied when the dispute involved a hierarchical church: *Turbeville v. Morris*⁹⁸ and *Bramlett v. Young*.⁹⁹

The *Turbeville* court noted that while a civil court “will accept as final the decision of a legally constituted ecclesiastical tribunal . . . this acceptance is not a ‘blind or perfunctory’ one.”¹⁰⁰ The court will not inquire into the “wisdom or correctness of ecclesiastical decisions.”¹⁰¹ The court will, however, conduct a limited four-part inquiry:

[T]he Court will make sure that the civil right is in fact dependent upon an ecclesiastical matter; it will determine whether the ecclesiastical body had jurisdiction; it will look to see if the steps required by the religious society have been taken; and will inquire into any charges of fraud, collusion or arbitrariness.¹⁰²

One of the key components of the *Turbeville* analysis was the recognition that hierarchical churches have “a body of constitutional and ecclesiastical law of [their] own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs” and that judges of the civil courts ought not to substitute their own judgment for that of the church hierarchy.¹⁰³ In summary, “where civil rights depend upon ecclesiastical matters,” the court’s inquiry must be limited to “jurisdiction, procedural steps, and arbitrariness.”¹⁰⁴ If these tests are met, the court may look no further into the hierarchy’s determination as to which faction owns the church property.¹⁰⁵

In *Bramlett v. Young* the court reasoned “[t]here can be no Presbyterian Church in the United States without an affiliation with a Presbytery.”¹⁰⁶ Therefore, the majority’s “attempted withdrawal from, and repudiation of, the

96. *Harmon*, 19 S.C. Eq. (2 Rich. Eq.) at 126 (“If a portion secede, and the rest, however small their number, adhere, the adherents, by their fidelity, secure their corporate existence, and are entitled to all the privileges and property of the corporation”).

97. *Id.* at 127-28.

98. 203 S.C. 287, 26 S.E.2d 821 (1943).

99. 229 S.C. 519, 93 S.E.2d 873 (1956).

100. 203 S.C. at 306, 26 S.E.2d at 828.

101. *Id.*

102. *Id.*

103. *Id.* at 305, 26 S.E.2d at 828 (citing *Watson v. Jones*, 80 U.S. 679 (1871)).

104. *Id.* at 316, 26 S.E.2d at 832. See also UNDERWOOD, *supra* note 36, at 147.

105. *Turbeville*, 203 S.C. at 316, 26 S.E.2d at 832.

106. *Id.* at 539, 93 S.E.2d at 883.

jurisdiction and authority of the church under which they were organized and under which they acquired valuable property rights” was difficult to “reconcile [] in law.”¹⁰⁷ Furthermore,

*even in the absence of an express and specific trust, an attempt by a faction . . . to sever its denominational or ecclesiastical connections without the assent of the governing body . . . can have no effect on property rights [T]he seceders, although a majority, will be held to have lost their rights to the church property.*¹⁰⁸

Principles of equity therefore may also guide the court.¹⁰⁹ If the local church has accepted the benefits of its association with the parent organization, it should not be permitted later to deny the affiliation in order to avoid undesired consequences.¹¹⁰

b. “Neutral Principles,” the Dennis Canon, and Other Jurisdictions’ Resolution of Episcopal Church Property Disputes

The Episcopal Church is a hierarchical church with a vast body of ecclesiastical law including church constitutions, canons, precedent, by-laws, rules and rubrics. Title I, canon 7, section 4 of the National Church Canons provides: “All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.”¹¹¹ Title II, canon 6, section 4 provides: “Any dedicated and consecrated Church or Chapel shall be subject to the trust declared with respect to real and personal property held by any Parish, Mission or Congregation as set forth in Canon I.7.4.”¹¹²

The constitution and canons of the Diocese of South Carolina contain similar trust provisions:

It shall not be lawful for any Vestry, Trustees or other body authorized by laws of any State or Territory to hold property

107. *Id.* at 540, 93 S.E.2d at 883.

108. *Id.* at 542-43, 93 S.E.2d at 885 (emphasis added).

109. *See, e.g.,* United Methodist Church v. St. Louis Crossing Indep. Methodist Church, 276 N.E.2d 916, 925 (Ind. Ct. App. 1971) (A local church *can* “remain independent of the influence of a parent church body . . . [by] maintain[ing its] independence in the important aspects of its operation—e.g., polity, name, finances.” A local church *cannot* “enter a binding relationship with a parent church which has provisions of implied trust in its constitutions, by-laws, rules and other documents pertaining to the control of property, yet deny the existence of such relationship.”).

110. *Id.* at 925.

111. CONSTITUTION & CANONS 2000, *supra* note 6.

112. *Id.*

of any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish, Mission or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.¹¹³

All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina.¹¹⁴

Because of these express trust provisions, the civil courts almost always award church property to the parent organization when a local congregation seeks to secede from the National Church. Across the country, state courts adjudicating Episcopal Church property disputes have overwhelmingly found in favor of the local diocese and national church.¹¹⁵ New York's Appellate Division, in *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*,¹¹⁶ adjudicated a dispute similar to that in *All Saints Parish*. The court held "an express and an implied trust" existed for the benefit of the diocese with respect to the local church property under title I, canon 7, section 4 of the Protestant Episcopal Church Canons, otherwise known as the "Dennis Canon," and awarded the church property to the local diocese and National Church.¹¹⁷

In *Trustees of the Diocese of Albany* the local church voted to secede from the denomination when the diocese refused to ordain the church's deacon-in-charge as a priest.¹¹⁸ The New York court applied "neutral principles of law" to resolve the underlying property question and examined all relevant

113. THE PROTESTANT EPISCOPAL DIOCESE OF SOUTH CAROLINA, CONSTITUTION & CANONS, Canon XXX, § 1 (2000).

114. *Id.* at Canon XXX, § 5.

115. *See, e.g.,* Bishop & Diocese of Colo. v. Mote (St. Mary's Church), 716 P.2d 85, 110 (Colo. 1986); Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn., 620 A.2d 1280, 1293 (Conn. 1993); Tea v. Protestant Episcopal Church in the Diocese of Nev., 610 P.2d 182, 184 (Nev. 1980); Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 24 (N.J. 1980).

116. 684 N.Y.S.2d 76 (N.Y. App. Div. 1999).

117. *Id.* at 82.

118. *Id.* at 78.

documents. First, the court found the church deeds contained no language on their face indicating the local church “acquired the property with the intention to hold it in trust” for the parent church, nor did the deeds contain a “trust restriction or forfeiture clause” in favor of the parent.¹¹⁹ However, the church’s certificate of incorporation expressly acknowledged its affiliation with the National Church and diocese, even though it did not indicate how the property was to be owned.¹²⁰ The certificate was also drawn pursuant to state law governing religious corporations, which confirmed the local church was hierarchical in nature and, therefore, subject to the control of its parent organization.¹²¹

The court also examined the express trust provisions of the Episcopal Church’s Dennis Canon.¹²² The Dennis Canon was passed as an amendment to church law in 1979 for the “intent and purpose” of setting forth “existing canonical church law,” expressly codifying the trust relationship that has “implicitly existed” between the local church and its parent organization.¹²³ Finding the Dennis Canon dispositive, the court held that church property belonged to the local diocese and the National Church.¹²⁴ This holding expresses the view of most courts across the country.¹²⁵

The Supreme Court of Kentucky stands virtually alone in holding for a local Episcopal congregation. In *Bjorkman v. Protestant Episcopal Church in the Diocese of Lexington* the court found no express trust existed in favor of the parent organization.¹²⁶ Significantly, the local church in *Bjorkman* seceded from the denomination in 1978, one year before the Dennis Canon was passed into law by General Convention of the National Church. Therefore, it seems unlikely the case would be resolved in favor of the local church today.

c. “Neutral Principles of Law” and the *All Saints* Dispute

i. *The Constitutional Error of the All Saints Order*

The neutral principles of law analysis in the *All Saints* Order was fundamentally flawed. First, the trial court presumed that the 1745 Trust Deed conveyed private rights of ownership, even though the Deed was conveyed for the express purpose of establishing a Church of England parish church at a time

119. *Id.* at 80.

120. *Id.*

121. *Id.* at 81.

122. *Trustees of the Diocese of Albany*, 684 N.Y.S.2d at 81.

123. *Id.*

124. *Id.* at 82.

125. See, e.g., *Bishop & Diocese of Colo. v. Mote* (St. Mary’s Church), 716 P.2d 85, 110 (Colo. 1986); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1293 (Conn. 1993); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980).

126. 759 S.W.2d 583, 587 (Ky. 1988).

when the Church of England was the “established church” of Carolina. As an established church, All Saints was formed by statute and paid for with public funds. To determine what private rights, if any, passed to the Trustees, the court was required to examine the laws governing the disposition of church property at the time of the conveyance. The 1706 Church Act controlled such dispositions, yet the court found the Act “inapplicable.”¹²⁷ Indeed, the court ignored all statutes and common law principles governing the disposition of church property at the time of the transfer.¹²⁸

Second, the court disregarded the hierarchical structure of the Episcopal Church organization.¹²⁹ Under *Bramlett* a fundamental inquiry when adjudicating property disputes involving a hierarchical church is the organizational identity of the local church.¹³⁰ By ignoring the All Saints organizational structure, the court permitted the church to accept the benefits of its association with its parent organization for 200 years and then later deny the relationship to avoid known consequences.

Third, the court failed to examine the National Church constitution and canons, the Diocese constitution and canons, and All Saints’s own articles of incorporation and by-laws. Neutral principles of law analysis necessarily involves an examination of all documents, including church documents, controlling the disposition and ownership of church property. The court nevertheless dismissed as irrelevant all church documents, including express trust provisions in the church’s own constitutions and canons.¹³¹

Finally, by failing to properly apply neutral principles of law, the court in effect provided a mechanism for the “establishment” of religion. In other words, the court took church property away from the hierarchical parent organization permitting All Saints to become “independent” of its parent while retaining its property. The establishment of any religion by the State is prohibited by both the United States and the South Carolina Constitutions.

ii. *The Proper “Neutral Principles of Law” Analysis To Be Applied*

The proper “neutral principles of law” analysis would first involve, under *Watson*, an examination as to whether the express terms of the 1745 Deed disposed of the case.¹³² Since All Saints was an established church of the royal colony in 1745, the court must examine the laws governing ownership of church property at the time of the conveyance in order to properly construe the

127. *All Saints Parish*, No. 2000-22-720, slip op. at 14.

128. *Id.* (“The Church Act and other statutes relied upon by the Diocese and the National Church, . . . while interesting from a historical perspective, . . . have no relevance to the facts of this case.”).

129. *Id.* at 8-9.

130. See *Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956).

131. *All Saints Parish*, No. 2000-22-720, slip op. at 10.

132. See *Watson*, 80 U.S. at 723.

intent of the parties. Part III of this Note explains the nature of the established church and how no private rights of ownership could have passed to the trustees under the 1745 Deed.

Concluding that the 1745 Deed is not dispositive of the matter, the court would next have to determine whether All Saints was a congregational or hierarchical church. For 200 years, All Saints has been a self-declared, active member of the National Church. As such, All Saints has been under the direct authority and control of the Diocese and its bishop. As was true in *Bramlett*, there is no Episcopal Church without an Episcopal diocese and bishop.¹³³ All Saints is not, nor has it ever been, an independent congregational church. Clearly, All Saints is a hierarchical church.

Having found All Saints to be a hierarchical church, the court would have to determine whether an express or implied trust regarding All Saints property existed in favor of the Diocese or the National Church. By using neutral principles of law to determine whether such a trust existed, the court would avoid interfering with the church's constitutional right to self-governance.

Neutral principles of law requires the court to examine all relevant documents. Those documents include the 1745 Deed, any other deeds disposing of All Saints property, all statutes and common law governing the ownership of church property at the time of the conveyance—including the 1706 Church Act and English common and ecclesiastical law—and Episcopal Church constitutions and canons governing church property. In examining these documents, the court must exercise “special care” to read them in “purely secular terms.”¹³⁴

If the court concluded All Saints is a hierarchical church and an express trust exists in favor of the Diocese and the National Church, the court's inquiry, under *Turbeville*, would be limited to “jurisdiction, procedure and arbitrariness.”¹³⁵ First, is the All Saints property dispute one in which a civil right of ownership depends upon an ecclesiastical rule? Second, do the Diocese of South Carolina and the National Church have jurisdiction to decide who owns All Saints property? Third, were the procedures for the disposition of church property followed? Fourth, was the Diocese's disposition of the All Saints property fraudulent, collusive or arbitrary?

Having “made all the inquiries the court may properly make in a case where civil rights depend upon ecclesiastical matters,” the court must then defer to the Episcopal church hierarchy's own determination as to who owns All Saints property.¹³⁶ In conclusion, a “total subversion” of hierarchical churches may transpire if churches such as All Saints could have the decision of the church hierarchy reversed by the secular courts.¹³⁷ Under neutral

133. 229 S.C. at 539, 93 S.E.2d at 883.

134. See *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

135. 203 S.C. at 316, 26 S.E.2d at 832.

136. *Id.*

137. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711 (1976).

principles of law, the property comprising All Saints belongs to the Diocese and the National Church.

III. THE STATUTORY ERROR: THE ESTABLISHED CHURCH AND ALL SAINTS, WACCAMAW

The trial court's statutory error was its failure to analyze the 1745 Trust Deed in light of the statutory scheme in place at the time of the conveyance. It is crucial to determinations of the ownership of the church property that one understands the framework within which Church of England churches, such as All Saints, were established.

A. *The Established Church of Carolina*

An established church generally involves:

action by a state 'to grant legal status, recognition or protection' to a church; 'to confer on a religion or religious body the position of a state religion or a state church'; . . . full establishment may involve duties on the state and the citizen to maintain the established church as well as legal preference to the exclusion of other religious communities.¹³⁸

The Church of England was "established" as the official "state" religion of England somewhat vicariously under the Supremacy Act of 1534. The Supremacy Act declared England's monarch, Henry VIII, to be the "supreme head in earth of the Church of England."¹³⁹ As the head of the church, the King gained direct control of the church institution and made the church itself part of his royal government.

The Act of Supremacy was designed to "supplant[] the power of the Catholic pope in Rome [and] . . . must be seen as part of a broader policy . . . of increasing the power of the English monarch and decreasing the influence of

138. NORMAN DOE, CANON LAW IN THE ANGLICAN COMMUNION 13 (1998).

139. SOURCES, *supra* note 29, at 311. The act also provided:

that the king, our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the Church of England called *Anglicans Ecclesia*, and shall have and enjoy, annexed and united to the imperial crown of this realm, as well the title and style thereof as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of the supreme head of the same Church belonging and appertaining. . . .

Id. at 311-12. The act was repealed by the Roman Catholic Queen Mary I in 1554 and reinstated by Protestant Elizabeth I when she ascended to the throne in 1559. *Id.*

Rome."¹⁴⁰ It was also designed to alleviate the problem that King Henry VIII needed money because his extravagant lifestyle and expensive military campaigns had depleted the royal treasury.¹⁴¹ The solution was to seize the enormous wealth and property of the formerly Roman Catholic churches in England.¹⁴² As head of the Church of England, Henry VIII gained access to and control of the church's vast real and personal property, particularly the property of the monasteries.¹⁴³

During the colonial period, the Act of Supremacy of 1534 was still largely in effect.¹⁴⁴ King Charles II was Head of the Church of England, and English ecclesiastical law, as well as common law, governed the relationship between the Sovereign and his Church.¹⁴⁵ Tax revenues were expended to erect, maintain, and staff the Church of England churches throughout the realm.¹⁴⁶ Since tax dollars were used to fund the national religion, local church establishment came about by Act of Parliament.¹⁴⁷

In the colony of Carolina, two important documents also governed Church of England churches: the letters patent, whereby King Charles II granted territorial control of Carolina to the Lords Proprietors,¹⁴⁸ and the Fundamental Constitutions, whereby the Lords Proprietors laid out their contractual relationship with Carolina settlers.¹⁴⁹ Under the letters patent, in addition to land rights, the Crown granted to the Lords Proprietors "the patronages and advowsons¹⁵⁰ of all churches and chappels, . . . together with license and

140. Britain Express: English History of the Act of Supremacy, *available at* <http://www.britainexpress.com/History/tudor/act-of-supremacy.htm>.

141. *Id.*

142. *Id.*

143. SIR MAURICE POWICKE, THE REFORMATION IN ENGLAND 28-29 (Oxford Univ. Press 1973) (1941) ("By the Act of 1536 (27 Henry VII, c. 28) the actual and real possessions of all the monastic houses . . . passed into the King's hands . . . but no other proprietary rights than those of the Crown were to be permitted.").

144. JOHN R.H. MOORMAN, A HISTORY OF THE CHURCH OF ENGLAND 248-253 (Morehouse Publishing 1980) (1963). After Oliver Cromwell's death in 1658, the monarchy was restored in England with the ascension of King Charles II to the throne. *Id.* at 248-49. The "restoration of the monarchy inevitably involved the re-establishment of the Church of England" with Charles at its head. *Id.* at 249. "Thus at Bartholomewtide the Church of England was fully and exclusively restored." *Id.* at 252.

145. *Cf. id.* at 248-53 (showing that since Charles II was Head of the Church in England, he was also Head of the Church in the royal colony of Carolina).

146. See WILLIAM J. RIVERS, A SKETCH OF SOUTH CAROLINA 117 (1972) (1856); *cf.* DOE, *supra* note 138, at 13 (explaining that the Establishment Act formed the institutional church by a "series of legislative acts"); UNDERWOOD, *supra* note 36, at 21.

147. *Cf.* UNDERWOOD, *supra* note 36, at 22 (explaining that every aspect of church administration was legislated).

148. *Id.* at 3 ("In 1663, Charles II granted a Charter for Carolina to the Lords Proprietor, a group of men to whom he was indebted for their assistance in regaining the throne that was lost after the execution of his father, Charles I.").

149. *Id.* at 7.

150. Under Ecclesiastical law, advowson is "[t]he right of presenting or nominating a person to a vacant benefice in the church. The person enjoying this right is called the 'patron' . . . of the church The patron presents the nominee to the bishop." BLACK'S LAW DICTIONARY 56 (7th

power to build and found churches, chappels . . . and to cause them to be dedicated and consecrated, *according to the Ecclesiastical laws of the Kingdom of England*.”¹⁵¹

“[E]cclesiastical law . . . in England . . . embraces both church-made and state-made law.”¹⁵² “Church-made law” includes church constitutions, “[a]cts, bylaws, rules and regulations, ordinances, resolutions, decrees, and liturgical rubrics.”¹⁵³ “State-made laws” include Acts of Parliament, royal proclamations, and the common law of the courts. The letters patent of King Charles II demonstrate how closely church and state were interwoven at the founding of Carolina. The patents conferred not only civil governance and property rights but ecclesiastical rights belonging to the King alone as head of the church, including the power to appoint clergy and to establish and erect churches.¹⁵⁴

Interestingly, church constitutions under ecclesiastical law are “sometimes accompanied by a separate document containing *fundamental declarations* or *fundamental principles*.”¹⁵⁵ The royal colony of Carolina was governed by similar documents called the Fundamental Constitutions,¹⁵⁶ so perhaps the letters patent were more ecclesiastical documents than civil ones. John Locke’s famous Fundamental Constitution of 1669 provided:

[I]t shall belong to the parliament to take care for the building of churches and the public maintenance of divines, to be employed in the exercise of religion, according to the Church of England; which being the only true and orthodox, and the *national religion of all the king’s dominions, is so also of Carolina*; and therefore it alone shall be allowed to *receive public maintenance by grant of parliament*.¹⁵⁷

The Lords Proprietors delegated, through contract, to their parliament the power the King gave to them to establish the Church in Carolina.¹⁵⁸ The Commons House of Assembly exercised that delegated power in the 1706

ed. 1999).

151. Anno Secundo GeorgII II. Regis., 1 S.C. STATUTES AT LARGE 60 (Thomas Cooper ed., 1836) (emphasis added). While this Act to Surrender Title is actually a 1729 agreement between George II and the Lords Proprietors, it still recounts line by line the original grant under the letters patent of Charles II. *Id.*

152. DOE, *supra* note 138, at 21 (emphasis omitted).

153. *Id.* at 21-22 (citations omitted).

154. At the time of the founding of Carolina, the Presbyterian Party had just lost control of the English Parliament to the Episcopalians (Church of Englanders), and all of the Lords Proprietors of Carolina, except the Earl of Shaftesbury, were Church of England advocates. RIVERS, *supra* note 146, at 77-78.

155. DOE, *supra* note 138, at 21.

156. MOORMAN, *supra* note 144, at 7.

157. The Fundamental Constitutions of Carolina of Mar. 1, 1669, para. 96, 1 S.C. STATUTES AT LARGE 43, 53 (Thomas Cooper ed., 1836) (emphasis added).

158. ROGERS, *supra* note 39, at 10-11.

Church Act, formally establishing the Church of England as the “official” church of Carolina.¹⁵⁹

1. *The 1706 Church Act*

In 1706, the Commons House of Assembly passed the Church Act establishing the Church of England as the “official” church of Carolina.¹⁶⁰ The Act divided the royal province of Carolina into ten parishes¹⁶¹ “for the better accommodation and conveniency of the inhabitants” and authorized six churches to be built for the “publick [sic] worship of God, according to the Church of England.”¹⁶² Importantly, the Act appointed twenty-four¹⁶³ lay “Church Commissioners” empowered, by statute, to take up grants of land and draw upon the public treasury for the building of Church of England churches throughout the colony.¹⁶⁴ Church Commissioners, as agents of the government, were also entitled to salaries paid from the public treasury.¹⁶⁵

Every aspect of church administration in Carolina required legislative permission, including church establishment, church land transactions, church construction, and even church repairs.¹⁶⁶ While the government directed the church’s temporal affairs, Church of England churches continued under the ecclesiastical authority of the bishop of the Diocese of London,¹⁶⁷ who sent Commissaries to visit colonial churches and report on their progress.¹⁶⁸

Another important aspect of the 1706 Church Act’s statutory scheme was that Commissioners acted as a body, even though each was charged with particular tasks within their own local “parishes.” The Church Commissioners were authorized:

159. See Act No. 256, 2 S.C. STATUTES AT LARGE at 282. It must be noted that Church of England supporters and detractors vied for power in the English Parliament during these years. The tide for and against the established church turned with the ascension of each new monarch, depending predominantly on the monarch’s own religious inclinations. See MOORMAN, *supra* note 144, at 249; ROBERT M. WEIR, COLONIAL SOUTH CAROLINA: A HISTORY 78 (1983).

160. Act No. 256, para. I, 2 S.C. STATUTES AT LARGE at 282-83.

161. Parishes were subdivisions much like counties. The “town hall” was the local church for which the parish was named.

162. Act No. 256, para. II & VI, 2 S.C. STATUTES AT LARGE at 283.

163. The Church Commissioners named under the 1706 Church Act were: Sir Nathaniel Johnson, Thomas Broughton, Nicholas Trott, Col. Robert Gibbes, Henry Noble, Ralph Izard, Col. James Risbee, Lt. Col. William Rhett, Lt. Col. George Logan, Arthur Middleton, Capt. David Davis, Thomas Barton, John Abraham Motte, Capt. Robert Seabrook, Hugh Hicks, John Woodward, Joseph Page, John Ashby, Richard Beresford, Thomas Wilkinson, Capt. Jonathan Fitch, William Bull, Rene Ravenel, and Philip Gendron. *Id.* at 288, para. XXIII.

164. *Id.* at 284-85, para. VIII-IX.

165. *Id.* at 289, para. XXV.

166. UNDERWOOD, *supra* note 36, at 22.

167. Cf. BULL, *supra* note 37, at 3 (showing that a Church of England minister wrote to the Bishop of London).

168. WILLIAM ROY SMITH, SOUTH CAROLINA AS A ROYAL PROVINCE, 1719-1776, at 10 (Books for Libraries Free Press 1970) (1903) [hereinafter WILLIAM ROY SMITH].

to meet to transact the business of this Act twice in the year, . . . and oftener if occasion shall require it, . . . provided they are not less than eleven, and the majority of them eleven consenting, may put in force and execution any of the powers granted to the commissioners by this Act.¹⁶⁹

Church Commissioners also acted as a grievance board and as a local “court” to adjudicate various complaints and violations of the Act.¹⁷⁰

The 1706 Church Act was but one example of how South Carolina’s colonial government was structured and how its governmental policies were implemented. Professor Walter Edgar described South Carolina’s commission system as a “complicated form of government and a demanding one.”¹⁷¹ The system “required participation by a relatively large percentage of the white male population” and was designed as a “check on potential corruption.”¹⁷² The commissioners acted as “extensions of the power and the authority of the assembly.”¹⁷³ The Assembly appointed all sorts of commissioners: commissioners of the highways, commissioners of the bridges, and commissioners of the ports.¹⁷⁴ Thus, each commissioner was appointed and statutorily empowered to accomplish a particular legislative goal.

The 1706 Church Act and its Church Commissioner system continued to be the law of Carolina until the Church of England was disestablished at the end of the Revolutionary War.¹⁷⁵

a. All Saints Founding Under the 1706 Church Act

All Saints began as a chapel in the remote area of Waccamaw Neck in Craven County, which is today Pawley’s Island.¹⁷⁶ Under the 1706 Church Act construction of chapels required legislative permission; thus, some act of the Assembly must have authorized All Saints’s founding.¹⁷⁷

A 1731 Act did authorize the building of two chapels in Craven County, in the parish of Saint James Santee, although neither chapel is named in the

169. Act No. 256, para. XXVI, 2 S.C. STATUTES AT LARGE at 289.

170. *Id.* at 293-94, para. XL.

171. WALTER EDGAR, SOUTH CAROLINA: A HISTORY 128 (1998).

172. *Id.* at 128-29.

173. *Id.* at 129.

174. *See, e.g.*, Act No. 442 of Sept. 15, 1721, 3 S.C. STATUTES AT LARGE 132 (Thomas Cooper ed., 1838); Act No. 552 of Mar. 11, 1726, 3 S.C. STATUTES AT LARGE 271 (Thomas Cooper ed., 1838); Act No. 1223 of Mar. 26, 1784, 4 S.C. STATUTES AT LARGE 621 (Thomas Cooper ed., 1838).

175. *See* S.C. CONST. of 1778, 1 S.C. STATUTES AT LARGE at 137-45.

176. Craven County encompassed all land in Carolina north of the Santee River. 1 S.C. DEED ABSTRACTS 1719-1772, Map of S.C. Counties 1682-1785 (abstractor Clara A. Langley, 1983). *See also* SUZANNE CAMERON LINDER, ANGLICAN CHURCHES IN SOUTH CAROLINA: THEIR HISTORY & ARCHITECTURE (2000) (map of Colonial Parishes of South Carolina).

177. UNDERWOOD, *supra* note 36, at 22.

act.¹⁷⁸ While it is unclear whether this precise statute gave All Saints its life, several factors indicate it may have.¹⁷⁹ First, Saint James Santee is the mother parish of Prince George Winyaw, which is the mother parish of All Saints.¹⁸⁰ Moreover, “[e]xcept for the chapel on Waccamaw Neck and another at Murray’s Old Field near the Santee, no other church was constructed” in that area before the Revolutionary War.¹⁸¹

The 1731 Act establishing the two Craven County chapels provided:

That one chappel of ease be built and erected in the lower part of the said parish, . . . at the point of the dividing of the paths leading to Mr. Jerman’s and Santee Savannah, commonly called Mr. Horry’s Savannah That one other chappel of ease be built and erected in the upper part of the said parish, some where near the place . . . commonly known by the name of Mr. Waties’s wolf trap.¹⁸²

An indication that the 1731 Act may have been the one establishing All Saints are letters revealing that a chapel appeared where All Saints sits on the Waccamaw Neck sometime between 1735 and 1739. The first letter is from the rector of Prince George Winyaw to the Bishop of London dated February 3, 1735.¹⁸³ The letter implies that no chapel existed, at that time, on the Neck: “Wackamaw Neck . . . [is] not provided for as a separate Parish but [is] an appendage still of Prince Georges, wch I must own they labour under great hardships because they can attend divine service no other way yn come by watr wch sometimes is very hazardous in blowing weather.”¹⁸⁴

The second letter described All Saints as an established chapel-of-ease of Prince George Winyaw church by 1739.¹⁸⁵ That letter was written by the Rev. John Fordyce who came to Craven County in 1736 to minister to worshipers

178. Act No. 533 of Aug. 20, 1731, 3 S.C. STATUTES AT LARGE 304 (Thomas Cooper ed., 1838).

179. Under the original 1706 Church Act, only one parish church, Saint James on Santee River, had been erected in Craven County. Act No. 256, 2 STATUTES AT LARGE at 282. Fifteen years later, in 1721, Saint James Santee was divided, and a new parish formed for the “inhabitants at Winyaw, in Craven county.” Act. No. 458 of Mar. 10, 1721, pmbl., 3 S.C. STATUTES AT LARGE 171, 171 (Thomas Cooper ed., 1838). That new parish was named Prince George Winyaw, and, thirty-six years after its establishment, it was subdivided to form All Saints Parish. Act No. 961 of May 23, 1767, pmbl. & para. I, 4 S.C. STATUTES AT LARGE 266, 266 (Thomas Cooper ed., 1838). It is possible that All Saints could have been first established as a chapel for the parish of Saint James Santee, and then later served as a “chapel-of-ease” for Prince George Winyaw Parish.

180. Act No. 458 of Mar. 10, 1721, pmbl. & para. I, 3 S.C. STATUTES AT LARGE 171 (Thomas Cooper ed., 1838); Act No. 961, pmbl. & para. I, 4 S.C. STATUTES AT LARGE at 266-68.

181. ROGERS, *supra* note 39, at 83.

182. Act No. 533, para. I, 3 S.C. STATUTES AT LARGE at 304.

183. BULL, *supra* note 37, at 3.

184. *Id.*

185. BULL, *supra* note 37, at 3-4.

on the Neck.¹⁸⁶ In a letter dated February 1, 1739, Fordyce wrote: "I generally preach at a Chapel of Wackamaw once per annum"¹⁸⁷

It appears that sometime after 1735, yet before 1739, All Saints was constructed as a chapel-of-ease in the remote part of Waccamaw Neck in Craven County.¹⁸⁸

Another indication that the 1731 Act may have been the act that first established All Saints is the fact that Craven County was very sparsely populated at the time. It seems likely that any act establishing two chapels in Craven County in 1731 would have included All Saints.¹⁸⁹ Another clue is that the 1731 Act appointed Elias Horry to supervise the construction of the chapel for the lower district.¹⁹⁰ Elias Horry was later named Church Commissioner along with Maj. George Pawley, in 1734, to supervise the building of All Saints "mother church," Prince George Winyaw.¹⁹¹ It makes sense that the same person chosen to supervise the building of All Saints mother church would also be chosen to supervise the construction of All Saints chapel.

Finally, a review of statutes establishing churches and records confirming their existence during this time period shows that generally five years lapses between the passage of the act authorizing a church's construction and the subsequent records confirming the church building's existence. Roughly five years lapsed between the passage of the 1731 Act and the earliest known reference to a chapel erected on the All Saints site. Sadly, since All Saints was unnamed in 1731, and neither chapel in the 1731 Act was given a name, it is difficult to know for sure whether this particular statute gave rise to All Saints or not.

b. The Establishment of All Saints's "Mother Church" and Church Commissioner George Pawley

All Saints's "mother church," Prince George Winyaw, was established by an act of the Assembly on March 10, 1721.¹⁹² The Assembly appointed Capt. Meredith Hughes, John Lane, and John Hayes as Church Commissioners.¹⁹³ In 1734, the Assembly appointed Maj. George Pawley, Daniel La Roche, and Elias Horry as Church Commissioners for Prince George Winyaw.¹⁹⁴ In the

186. *Id.*

187. *Id.* Later, Fordyce wrote: "The 19th of July Last (1741), I preached at Wackamaw Chapel, a Distant part of the Prince Georges Parish having given notice of my attendance and Design a Month before." *Id.* at 4.

188. See Act No. 567 of Apr. 9, 1734, 3 S.C. STATUTES AT LARGE 374 (Thomas Cooper ed., 1838). Significantly, in 1734, George Pawley was appointed Church Commissioner for the Parish of Prince George Winyaw where All Saints was first erected. *Id.* at 375, para. VI.

189. Notably, no other statute during this time period established chapels in Craven County.

190. Act No. 533, para. V, 3 S.C. STATUTES AT LARGE at 305.

191. Act No. 567, para. VI, 3 S.C. STATUTES AT LARGE at 375.

192. Act. No. 458, 3 S.C. STATUTES AT LARGE at 171.

193. *Id.* at 172, para. V.

194. *Id.* at 375, para. VI.

subscription list raised January 1, 1736 for the building and completing of Prince George church, George Pawley contributed £ 50 and William Poole contributed £ 30 of the total £ 1040 raised.¹⁹⁵ In 1741, the Assembly passed an act to reimburse George Pawley with public funds for expenses he incurred in erecting the Prince George church and parsonage house.¹⁹⁶ The same 1741 Act provided the method by which successor Commissioners for Prince George were to be appointed: "[I]n case of the death, absense or resignation of the said commissioners, the remaining commissioners, or so many of them as will meet, . . . shall or may choose a person . . . of the church of England, to be commissioner"¹⁹⁷

Both the 1734 and the 1741 Acts are significant. They demonstrate that, at the time the 1745 Trust Deed at issue was created, George Pawley was a Church Commissioner specifically empowered by statute to take up grants of land as an agent of the government in order to build Church of England churches in the very parish where All Saints was first erected as Prince George Winyaw's chapel-of-ease. In 1745, the Assembly had also passed an act appointing several new Church Commissioners to serve throughout the colony.¹⁹⁸ At that time, all but one of the original Commissioners under the 1706 Church Act had died, resigned or "gone off."¹⁹⁹ Since the Commissioners acted as a body, new Commissioners were needed to carry out the royal government's church expansion plan.²⁰⁰ Under the Church Act, only Commissioners had statutory power to take up grants of land, to decide where new churches should be built, to raise money from willing donors (and assess the unwilling), and to supervise the construction of Church of England churches, chapels and parsonages. Without a quorum of eleven commissioners, the purposes of the 1706 Church Act could not be fulfilled.²⁰¹ Since successor Commissioners were either appointed by the Assembly or elected by local parishioners, it seems unlikely that the Commissioners would have obtained

195. DALCHO, *supra* note 39, at 305.

196. Act No. 679 of Mar. 8, 1741, pmbl. & para. I, 3 S.C. STATUTES AT LARGE 579, 579 (Thomas Cooper ed., 1838).

197. Act No. 726 of May 25, 1745, pmbl., 3 S.C. STATUTES AT LARGE 650, 650 (Thomas Cooper ed., 1838).

198. Act No. 679, pmbl., 3 S.C. STATUTES AT LARGE at 579-80.

199. *Id.* at 580, pmbl.

200. Act No. 726, pmbl., 3 S.C. STATUTES AT LARGE at 650.

201. *Id.* at 650-51, pmbl. & para. I. The following new commissioners were appointed: (1) Parish of St. Philip's, Charlestown: Governor William Bull, James Kinloch, John Fenwicke, Joseph Wragg, John Hammerton, John Colleton, Edmond Atkin, Joseph Blake, William Middleton, John Cleland, Charles Pinckney, Richard Hill, the Rev. Alexander Garden, Benjamin Whitaker, and Gabriel Manigault; (2) Parish of St. Andrew: William Bull, Jr.; (3) Parish of St. James Goose Creek: Benjamin Godin; (3) Parish of St. Thomas and St. Dennis: Capt. Thomas Ashby; (4) Parish of St. Paul: Capt. John Bull; (5) Parish of St. John Colleton: John Stanyarne; (6) Parish of St. Bartholomew: Henry Hyme; (7) Parish of St. Helena: Col. Nathaniel Barnwell; and (8) Parish of Prince Frederick: Anthony Atkinson. (Commissioners for Prince George Winyaw are noticeably missing, presumably because commissioners, such as George Pawley, were still actively serving in the Parish).

private rights in property acquired during the execution of their statutory duties.

In 1752, when public tax dollars and individual assessments failed to provide all the money needed to complete Prince George Winyaw's church, the Assembly appropriated import and export duties "into the hands" of the Church Commissioners for finishing the church.²⁰² Since Commissioners were reimbursed for expenses incurred, it was the public-at-large and not the Commissioners who "purchased" church property.

c. The Establishment of All Saints as an Independent Parish

In accordance with the provisions of the 1706 Church Act, All Saints was established as a separate and independent parish by act of the Assembly on May 23, 1767.²⁰³

WHEREAS, . . . several inhabitant[s] on Waccamaw Neck, in the parish of Prince George, by their petitions to the General Assembly, have represented many inconveniences which they are under, for want of having the said parish[] of . . . Prince George divided, . . . and also that part of the parish of Prince George, known by the name of Waccamaw, established into [a] separate parish[. . .], and prayed that a law may be passed for that purpose . . . *be it enacted* . . . that [a] parish shall be laid out and established in Craven county . . . and . . . shall hereafter be called and known by the name of All Saints.²⁰⁴

The 1767 Act establishing All Saints as an independent parish appointed the following Church Commissioners to supervise the construction of All Saints church, chapel, and parsonage house: William Pawley (George Pawley's son),²⁰⁵ William Alston, Joseph Allston, Charles Lewis, Josias Allston, William Allston, Jr., and John Clarke.²⁰⁶

The creation of the new parish of All Saints not only established a place of worship according to the Church of England but also created a new political unit.²⁰⁷ "Each parish was entitled to send representatives to the Assembly; according to the above act, two were to be elected annually from All Saints."²⁰⁸

202. Act No. 799 of May 16, 1752, para. I, 3 S.C. STATUTES AT LARGE 755, 755-56 (Thomas Cooper ed., 1838).

203. Act No. 961, 4 S.C. STATUTES AT LARGE at 266.

204. *Id.* at 266, pmbl. & para. I.

205. CHARLOTTE KAMINSKI PREVOST & EFFIE LELAND WILDER, PAWLEY'S ISLAND: A LIVING LEGEND 6 (4th ed. 1972).

206. Act No. 961, para. VIII, 4 S.C. STATUTES AT LARGE at 267.

207. BULL, *supra* note 37, at 7.

208. *Id.*

However, during this time, complaints had been lodged that the Assembly was over-represented by coastal parishes and under-represented by parishes in the up-country.²⁰⁹ To make matters worse, the British government did not want the Assembly “enlarged by added representation.”²¹⁰ Consequently, “the King vetoed several acts creating new parishes in the low country and in 1767 ordered all governors in America to veto all acts increasing or diminishing the number of Assembly members.”²¹¹ Hence, “the first act creating All Saints [Parish] was nullified in 1770.”²¹²

Despite the nullification, at the end of the Revolutionary War, the new State of South Carolina re-established All Saints Parish on March 16, 1778.²¹³ The 1778 Act re-establishing All Saints appointed the following new Church Commissioners to supervise the building of All Saints’s church, chapel and parsonage house: Percival Pawley (George Pawley’s son or nephew), Joseph Allston, and Thomas Butler.²¹⁴

In sum, the statutory scheme demonstrates that All Saints was a creature of statute; therefore, church property was bought and sold to agents of the government acting in their official capacities. Church Commissioners, such as Pawley, were public, not private, trustees. The fact that Percival Pawley was appointed successor Church Commissioner for All Saints, yet claimed no private rights of ownership in the now disputed property, is another indication that the Commissioners themselves had no private right of ownership in church property. If such rights had vested in them, then presumably all heirs of colonial Church Commissioners who held deeds under the 1706 Church Act may now claim title to underlying church property. Such property includes that of Prince George Winyaw and perhaps other historic landmarks such as St. Philip’s or St. Michael’s located in downtown Charleston.

B. The End of the Established Church in Carolina

The Revolutionary War conclusion ushered in the end of the established Church of England in South Carolina. The South Carolina Constitution of 1778 provided that the entire “Christian Protestant religion,” not just the Church of England, was the “established religion” of the State.²¹⁵ Thus, while the Church of England lost its legal preference, it was still publicly funded just like any other Protestant Christian religion. The big difference was that Church of

209. *Id.*

210. *Id.*

211. *Id.*; see also WEIR, *supra* note 159, at 139 (“Imperial authorities disallowed less than 4 percent of the 638 acts passed between 1719 and 1776 . . .”).

212. BULL, *supra* note 37, at 7.

213. Act No. 1071 of Mar. 16, 1778, 4 S.C. STATUTES AT LARGE 407, 407-08 (Thomas Cooper ed., 1838).

214. *Id.* at 408, para. V.

215. S.C. CONST. of 1778, art. XXXVIII, 1 S.C. STATUTES AT LARGE at 144-45.

England churches now competed with other denominations for public funds.²¹⁶ The South Carolina Constitution of 1778 also provided “the churches, chapels, parsonages, glebes, and all other property now belonging to any societies of the Church of England,” remained forever secured to the religious societies.²¹⁷ Even though the Church of England fell out of favor, which is understandable given the animosity toward England at the end of the War, its churches were constitutionally permitted to keep church property.

Twelve years later, the new state Constitution put an end to all established religion in South Carolina. The South Carolina Constitution of 1790 firmly and forever removed the preferential treatment previously enjoyed by state-funded churches:

The free exercise and enjoyment of religious profession and worship, *without* discrimination or *preference*, shall, forever hereafter, be allowed within this state to all mankind; . . .

The rights, privileges, immunities, and estates, of both civil and religious societies and of corporate bodies, shall remain as if the constitution of this state had not been altered or amended.²¹⁸

Without financial support from the new State, Church of England congregations were forced for the first time to raise their own money in order to erect, maintain and repair church buildings. Having suffered a tremendous “public relations” blow because of the Church of England’s status as a royal entity, the Church of England lay dormant in South Carolina for nearly twenty years without a bishop or a centralized system of government to oversee local churches.²¹⁹ During this “down” period, local congregations acted very much as if they were congregational churches. Church members continued to meet for worship according to the Book of Common Prayer, and church wardens continued to run the day-to-day affairs of the parish.²²⁰

“In 1793 Captain Jack Allston had had the first [All Saints] church taken down and a new one erected in its place.”²²¹ Despite the new church building, All Saints was not formally “reactivated until the Reverend Hugh Fraser

216. This point was made by Professor Walter Edgar in a lecture held at St. John’s Episcopal Church, Shandon (Columbia, S.C.) (Spring 2002).

217. S.C. CONST. of 1778, art. XXXVIII, 1 S.C. STATUTES AT LARGE at 145.

218. S.C. CONST. of 1790, art. VIII, §§ 1, 2, 1 S.C. STATUTES AT LARGE at 191 (emphasis added).

219. GEORGE HODGES, THREE HUNDRED YEARS OF THE EPISCOPAL CHURCH IN AMERICA 47-49 (1906). The Church of England in America faced many obstacles. Bishops had to swear allegiance to the King, which was a treasonous notion after the Revolution. The English Parliament had to approve a bishop’s consecration, which was difficult to obtain after the Revolution. A Church of England bishop had to represent a “national church” and, of course, there was no national church in the newly independent America. *Id.*

220. ROGERS, *supra* note 39, at 194.

221. *Id.* at 271.

accepted a call in 1812.”²²² The reactivation of All Saints came five years after the Church of England reorganized statewide as the Protestant Episcopal Church in South Carolina during the Charleston conventions of 1806 and 1807.²²³ During the Charleston conventions, local churches belonging to the Protestant Episcopal Church in South Carolina agreed to adhere to the newly formed national church governing body, the Protestant Episcopal Church in America.²²⁴

All Saints’s new church building was “fitted with pews and on November 19, 1816 was consecrated by Bishop Theodore Dehon,” the first Episcopal bishop of South Carolina.²²⁵ All Saints joined the new national church body and, as an Episcopal Church, came under the direct control and authority of the local bishop.²²⁶

IV. THE ERROR REGARDING THE VALIDITY OF THE 1745 TRUST DEED AND THE CHAIN OF TITLE OF THE ALL SAINTS PROPERTY

A. *The Proprietary Period and the Hutchinson Grant*

Contrary to the *All Saints* Order,²²⁷ the property comprising All Saints Waccamaw was never part of the Hobcaw Barony.²²⁸ All Saints property lies well north of the northern boundary of the barony as indicated in the barony maps drawn by Henry A.M. Smith in 1913.²²⁹ Most of the land grants north of the Hobcaw Barony were made in 1711, or shortly thereafter.²³⁰ During that

222. *Id.*

223. *Id.* at 194.

224. *Id.*

225. *Id.* at 271.

226. See *Rector, Wardens & Vestrymen of Trinity-St. Michael’s, Parish Inc. v. The Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1289 n.17 (Conn. 1993):

The ceremony of consecration has more than just religious significance; the ceremony involves the dedication of a building for a particular purpose, namely the worship of services in the building according to the doctrine of the Episcopal Church. If the building is no longer used for that purpose, it is deconsecrated. Moreover, only after individuals wishing to form a parish represent to the diocese that they will hold their property in this way are they considered for admission into the diocese as a parish.

227. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, No. 2000-22-720, slip op. at 4 (S.C. 15th Jud. Cir. Oct. 10, 2001).

228. HENRY A.M. SMITH, 1 *THE BARONIES OF SOUTH CAROLINA* 10 (1988) (map of Hobcaw Barony, May 1913) [hereinafter *Map of Hobcaw Barony*]. Moreover, the entire 12,000 acres of the Hobcaw Barony vested in John, Lord Carteret, in 1711. Carteret held the barony property until he conveyed the land to “John’s Roberts of Dean’s Court Middlesex” in 1718. John Roberts had the property surveyed, and the grant was expanded to 13,970 acres in 1736. See BULL, *supra* note 37, at 1. Note that this transfer occurred well after Charlotte Hutchinson conveyed the subject property (500 acres) to Percival Pawley in 1731.

229. *Map of Hobcaw Barony*, *supra* note 228.

230. BULL, *supra* note 37, at 2.

time, there was great concern over “fraudulent and exorbitant [land] grants.”²³¹ Speculators were acquiring “[l]arge tracts of land near . . . settlements,” retarding the growth of the colony.²³² In reaction to the problem, the Lords Proprietors instructed in a 1699 order: “no more than five hundred acres should thereafter be granted to one person without special order from their board, and that all future grants should contain a clause of forfeiture unless settlement was made within four years.”²³³

In 1710, when the problem of land abuses had not been resolved, the Lords Proprietors issued another order providing that “no land should be sold by any agent whatsoever without an immediate order from the proprietors.”²³⁴ “All persons who desired land were compelled to apply at the proprietary board in London.”²³⁵

In 1711, the Right Honorable Earl of Craven, for whom Craven County was named, held title of Palatine.²³⁶ Later that year, Craven granted land in Craven County to Landgrave Smith. Dr. John Hutchinson, a Charleston pharmacist, obtained 500 acres from Landgrave Smith, as laid out by a plat dated June 20, 1711.²³⁷ The colonists were most likely still operating under the 1699 “500 acre rule” given that the Lords Proprietors’ 1710 order worked a “great hardship [on] the people of the province” and sparked “numerous” “complaints and petitions” leading to its revocation in 1713.²³⁸

Regardless of settler adherence to the 1710 order, no land could be sold by any agent whatsoever without an immediate order from the Proprietors. Unless Hutchinson applied to and obtained an order from the proprietary board in London, no title could be passed to him. Presuming Hutchinson obtained such an order and his grant was good, the question is what happened next.

Dr. Hutchinson died in 1729,²³⁹ leaving by will a life interest in his Charleston home to his wife Charlotte,²⁴⁰ and the right to sell his property in Craven County to his executors.²⁴¹ Also in 1729, all but one of the original

231. WILLIAM ROY SMITH, *supra* note 168, at 31.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Palatine was the “head” of the Lords Proprietors, an office that rotated.

237. See 4 S.C. DEED ABSTRACTS, 1719-1772, at 122 (abstractor Clara A. Langley, 1983). The plat for the original Hutchinson grant is dated June 20, 1711. *Id.*

238. WILLIAM ROY SMITH, *supra* note 168, at 31-32.

239. Yellow Fever wreaked havoc on Charleston in 1728. “[S]o many [people] died and ‘so quick was the putrefaction, so offensive and infectious were the corpses,’ that even relatives were reluctant to bury them . . .” WEIR, *supra* note 159, at 110.

240. “At common law, the right of a wife, upon her husband’s death, to a life estate in one-third of the land he owned in fee” was termed “dower.” BLACK’S LAW DICTIONARY 507 (7th ed. 1999).

241. 1 ABSTRACTS OF THE WILLS OF THE STATE OF SOUTH CAROLINA, 1670-1740, at 164 (Caroline T. Moore & Agatha Aimar Simmons eds., 1960). The Hutchinson will reads:

JOHN HUTCHINSON, Charles Town, Gent. Wife: Charlotte, brick house where I live for life, then to son John . . . executors to sell plantations in St.

seven Lords Proprietors surrendered all rights that had been granted to them by Charles II to King George II by an Act of Parliament.²⁴² The *Anno Secundo George II. Regis* declared the Lords Proprietors surrendered all rights to the Crown in exchange for “two thousand five hundred pounds a-piece.”²⁴³ The Proprietors also surrendered their rights to collect quit rents and other rents owed them in exchange for an additional “nine thousand five hundred pounds a-piece.”²⁴⁴

In response to the Surrender Act, Carolina’s Commons House of Assembly passed its own act calling for the registration of all land grants so that the King’s quit rents could be properly assessed and collected (Registration Act).²⁴⁵ The Registration Act provided:

[A]ll land whatsoever lying and being within the . . . Province of South Carolina, . . . that shall not be registered in the office of the . . . Auditor General . . . within eighteen months . . . shall be reputed, deemed and taken as vacant lands . . .²⁴⁶

The Assembly passed another act on the same day in order to raise revenue for the new royal government (Tax Act). The Tax Act required settlers’ property to be assessed at its fair market value.²⁴⁷

To accomplish the assessment and collection of taxes, the Tax Act appointed “inquirers” whose duty it was to value the land within their respective parishes at a “reasonable selling price” and to verify that the accounts of the landowners’ holdings were accurate.²⁴⁸ Interestingly, George

Thomas’ and St. Dennis’ Parish, Christ Church Parish, or in any part of Craven County.

242. The Surrender included all proprietary land “except only one Barony, belonging to the present Sir John Colleton, which hath been settled and improved by his son.” *Anno Secundo George II. Regis.*, 1 S.C. STATUTES AT LARGE at 63. The surrender came on the heels of years of complaints lodged by both settlers and the King regarding the Lords Proprietors’ governance of Carolina. WILLIAM ROY SMITH, *supra* note 168, at 32.

243. 1 S.C. STATUTES AT LARGE at 63-64.

244. *Id.* at 64.

245. Act No. 532 of Aug. 20, 1731, 3 S.C. STATUTES AT LARGE 289 (Thomas Cooper ed., 1838).

246. *Id.* at 292, para. VII.

247. Act No. 536 of Aug. 20, 1731, 3 S.C. STATUTES AT LARGE 308 (Thomas Cooper ed., 1838). The tax money was needed to finance the new royal Governor’s settlement expansion plans. Governor Johnson had been directed to lay out eleven new settlements: “two each on the Altamaha, Savannah, and Santee, and one each on the Pon Pon, Wateree, Black, Peedee and Waccamaw.” ROBERT L. MERRIWETHER, *THE EXPANSION OF SOUTH CAROLINA, 1729-1765*, at 20 (1974).

248. Act No. 536, para. II-III, 3 S.C. STATUTES AT LARGE at 309. The Tax Act further provided that “all deeds of gifts, conveyances, mortgages, sales, or assignments of lands and tenements . . . whatsoever, made with an intent to avoid his being assessed or paying his tax, are hereby deemed and declared to be fraudulent, and *null and void* to all intents and purposes whatsoever.” *Id.* at 315, para. XXIV (emphasis added).

Pawley was appointed both inquirer and assessor (collector) for Prince George Winyaw Parish, where the widow Hutchinson's 500 acres lay.²⁴⁹

From August 5 to 6, 1731, fourteen days before the Registration and Tax Acts took effect, Charlotte Hutchinson conveyed her 500 acres in Craven County to Percival Pawley, George Pawley's brother.²⁵⁰ The 1731 Deed from Hutchinson to Pawley stated:

CHARLOTTE HUTCHINSON, widow, & ROBERT HUME . . . executor of will of DR. JOHN HUTCHINSON, physician, of Charleston, to PERCIVAL PAWLEY, planter, of Craven Co., for £ 250 currency, 500 a. on Winyaw River, in Craven Co. . . . by plat dated 20 June 1711, which land JOHN HUTCHINSON by will dated 20 Dec. 1729 authorized his executors to sell . . .²⁵¹

It cannot be insignificant that in August of 1731, Charlotte Hutchinson owed quit rents to the Crown and property taxes to the Assembly. Both were to be assessed at the fair market value of her late husband's estate. Before the passage of the Registration and Tax Acts, the Hutchinsons had only been required to pay quit rents to the Lords Proprietors at a value actually stated in their original grant, usually a penny an acre,²⁵² and the land was "free of taxes for a ten-year period."²⁵³ Therefore, as a widow, Charlotte may have had no way to pay the new obligations. Her late husband had left her only a life interest in her Charleston home. It seems likely that she would have been forced to sell off some of her husband's estate in order to pay her obligations. If Charlotte could not pay, she lost all interest in the property. "Land which was abandoned or lost through unpaid taxes reverted to the royal government and could be regranted."²⁵⁴

Significantly, if Charlotte's intent at the time she conveyed the 500 acres to Percival was to avoid taxes, then under the 1731 Tax Act, the transfer was null and void as a matter of law.²⁵⁵ Moreover, by failing to register the grant with his Majesty's Auditor General within eighteen months, as required by the

249. *Id.* at 309-10, para. III.

250. 4 S.C. DEED ABSTRACTS, 1719-1772, at 122 (abstractor Clara A. Langley, 1984). The Percival Pawley mentioned in the 1731 Deed must have been George's brother, Percival Jr., and not his father, Percival I. Percival I had died in 1723, while Percival Jr. died in 1749. An entry in the Pawley family Bible stated: "Thursday the 14th of November 1723 my father Percivell Pawly drowned at ye North Inlate about 9 or 10 a Clock at nite—being 50 years old & was very harty and healthy." PREVOST & WILDER, *supra* note 207, at 6. *See also* ROGERS, *supra* note 39, at 57 n.9 (George Pawley died 1774; Percival Pawley, Jr. died 1749).

251. 4 S.C. DEED ABSTRACTS, 1719-1772, at 122 (abstractor Clara A. Langley, 1984).

252. WILLIAM ROY SMITH, *supra* note 168, at 26.

253. PAWLEY'S ISLAND: HISTORICALLY SPEAKING 8 (1994).

254. *Id.* at 9.

255. Act No. 536, para. XXIV, 3 S.C. STATUTES AT LARGE at 315.

Registration Act, the 500 acres in Craven County may have become vacant land and reverted to King George II to be regranted.

B. The 1745 Trust Deed

In 1745, Percival Pawley conveyed fifty acres of the Hutchinsons' former 500 acres to his brother George. It is this 1745 Trust Deed that is at issue in the All Saints dispute. The Deed states:

PERCIVAL PAWLEY, planter, & ANN his wife, to GEORGE PAWLEY & WILLIAM POOLE, trustees; . . . for £ 100 currency, 50 a., part of 500 a. formerly belonging to DR. JOHN HUTCHING [sic] . . . to be used for a church (Church of England) by the inhabitants of Waccamaw Neck.²⁵⁶

An argument can be made that since Pawley was Church Commissioner for Prince George Winyaw Parish, which included All Saints in 1745, the conveyance to Pawley was as a public, not a private, trustee. If the 1745 Trust Deed was to Pawley as an agent of the government and not as a private landowner, then his heirs have no claim in All Saints property today. In support of this argument are the terms of a 1737 Trust Deed that also names Pawley as Trustee for land granted to establish the church of Prince George Winyaw.²⁵⁷

In the "Conveyance of Georgetown," Pawley was named Trustee in the grant of land for the founding of a Church of England church, churchyard, and school, and the Presbyterian Church, and the Antipedo Baptist Meeting house and burial ground, and the courthouse, and the prison.²⁵⁸

Under the 1737 Deed of Trust, the present landowners renounced their rights of inheritance

to be set apart & vested in PAWLEY, SWINTON & LAROCHE, trustees, for *public use* as follows: . . . 2 a., set apart for a church & churchyard for worship according to Church of England, . . . 1 a., set apart for a Presbyterian Meeting House for divine worship . . . also a burial place; . . . 1 a., for a Meeting house for the Antipedo Baptists & burial place; . . . 1 a., for a grammar school . . . the master to be licensed by the Bishop of London, . . . or his Commissary in S.C.; . . . 1 a., for a . . . townhouse, courthouse & prison . . .²⁵⁹

256. 3 S.C. DEED ABSTRACTS, 1755-1768, at 328 (abstractor Clara A. Langley, 1983).

257. 2 S.C. DEED ABSTRACTS, 1740-1755, at 269-72 (abstractor Clara A. Langley, 1984).

258. *Id.*

259. *Id.* at 271 (emphasis added).

If the 1745 Trust Deed gives Pawley's heirs rights to the All Saints property, then Pawley's heirs also take with respect to the land mentioned in the 1737 Trust Deed. This result seems absurd.

If Trustees held no vested rights in church property, a question arises: Why did landowners not simply convey property directly to the local church? The answer may lie in an old statute of England, the Statute of Mortmain.²⁶⁰ Translated, the statute provided:

[N]o person, religious or other, whatsoever he be, shall presume to buy or sell any lands or tenements, or under colour of gift or lease, or of any other term or title whatever to receive them from any one, or in any other way, by craft or by wile to appropriate to himself, whereby such lands and tenements come into mortmain; under pain of forfeiture of the same. We have provided also that if any person, religious or other, do presume either by craft or wile to offend against this statute, it shall be lawful for us and for other immediate lords in chief of the fee so alienated, to enter it within a year from the time of such alienation and to hold it in fee as an inheritance.²⁶¹

The purpose of the Statute of Mortmain was to eliminate "the fraudulent bestowal of estates on religious foundations, on the understanding that the donor should hold them as fiefs of the church, and as so exonerated from public burdens."²⁶² Other English "laws such as the Provisions of Westminster and Magna Carta essentially required the Crown's authorization before land could vest in a religious corporation. The object was to prevent lands from being held by religious corporations in perpetuity."²⁶³ In England, even today "the church is not of itself a corporation and as such it does not therefore hold property; it does so through representative owners . . . [A]t the national level the Church Commissioners may acquire and hold a wide range of properties."²⁶⁴

Moreover, under the Supremacy Act of 1534, only the King could make grants of church property.²⁶⁵ It is nevertheless noteworthy that the Statute of

260. SELECT CHARTERS & OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 457-59 (William Stubbs ed., 8th ed. 1905).

261. *Id.*

262. The Avalon Project: Statute of Mortmain; November 15, 1279, available at <http://www.yale.edu/lawweb/avalon/medieval/mortmain.htm>. Mortmain is French for "dead hand." It is as "[t]he condition of lands or tenements held inalienably by an ecclesiastical or other corporation." BLACK'S LAW DICTIONARY 1030 (7th ed. 1999).

263. BLACK'S LAW DICTIONARY 1030 (7th ed. 1999).

264. DOE, *supra* note 138, at 305.

265. "The supremacy of the King in Parliament was secured, and henceforth any purchaser or grantee of monastic lands had to secure title from the Crown." POWICKE, *supra* note 143, at 29 (emphasis added).

Mortmain and other laws prevented grants *to* religious associations, such as churches like All Saints.

At the time of the 1745 conveyance, it was probably illegal for Percival Pawley to convey the property at issue to All Saints church. The property, instead, was held in trust by trustee-commissioners, such as George Pawley, who acted as agents of the royal government.

C. All Saints Property Vests in the Church Corporation

Once the Revolutionary War ended, all royal property within the Province escheated to the new State of South Carolina. By the constitutional provisions of 1778 and 1790, all property that belonged to the Church of England churches were secured in the religious societies themselves forever.²⁶⁶

Upon disestablishment of the church, each congregation was permitted to incorporate and retain ownership of church property.²⁶⁷ In 1820, All Saints Episcopal Church was incorporated by an act of the Assembly, which vested all church property in a newly formed religious corporation.²⁶⁸

[T]he vestry and wardens of the Episcopal Church of All Saints Parish, . . . duly elected or appointed, shall be, and they are hereby declared to be, a body politic and corporate, in deed and in law, by the name and style of "The Episcopal Church of All Saints Parish;" . . . and shall be able and capable in law, to have, hold, take, and receive, by purchase, devise, donation, or otherwise, either in perpetuity or for a term of years, any estate, real or personal . . .²⁶⁹

The All Saints Incorporation Act continued:

all the lands in the said Parish of All Saints, which have, or hereafter shall or may escheat, shall be, . . . vested in said corporation; . . . and the said corporation is hereby vested with all the powers heretofore vested by law in the several

266. "But the churches, chapels, parsonages, glebes, and all other property now belonging to any societies of the Church of England, or any other religious societies shall remain and be secured to them forever." S.C. CONST. of 1778, art. XXXVIII, 1 S.C. STATUTES AT LARGE at 145.

267. ROGERS, *supra* note 39, at 194.

268. The Protestant Episcopal Church in South Carolina was created as successor to the Church of England during the Charleston conventions of 1806-1807. *Cf. id.* (noting that the same churches that comprised the former Church of England joined the new church of South Carolina). The national church (Protestant Episcopal Church in America) was formed during the general conventions of Philadelphia in 1789, where Samuel Seabury was elected the first American Episcopal bishop. HODGES, *supra* note 219, at 82, 95.

269. Act No. 2246 of Dec. 20, 1820, para. XXXVI, 8 S.C. STATUTES AT LARGE 312, 318-19 (David J. McCord ed., 1840).

escheators throughout the State, so far as respects the interest of the State in the said escheated property.²⁷⁰

All Saints's incorporation as an Episcopal Church demonstrates its wardens and members voluntarily accepted the local church's affiliation with the National Church body and freely came under the authority of the Diocese and its bishop. If the heirs of Pawley or Poole believed they had any rights in the church's property at all, then a complaint should have been brought in 1820 when the church was incorporated. However, no heir brought any such claim.

From 1820 to the filing of the present action in 2000, All Saints has been an active, self-declared member of the National Church and the Diocese. All Saints has obtained diocesan approval for all construction projects, land sales, and major financial transactions in connection with the All Saints property. All parties, including the lenders, have understood that All Saints property, as that of an Episcopal Church, is held in trust for the benefit of the Diocese and the National Church. At no time prior to the present lawsuit has anyone suggested legal title of All Saints property was held by anyone else.

V. CONCLUSION

The fundamental constitutional freedom of religion guaranteed by the separation of church and state must be preserved. Civil courts, therefore, should take jurisdiction of church property disputes reluctantly unless criminal or fraudulent behavior is involved. Moreover, when the courts choose to exercise jurisdiction over church property disputes, they must be mindful of the constraints imposed on their power by the First and Fourteenth Amendments. History teaches that nearly all church property disputes have some theological or ecclesiastical issue at their core, over which the civil courts have no jurisdiction.

The court must also be mindful that when the dispute involves a hierarchical church, like All Saints, it is almost impossible to separate the property issue from theological and ecclesiastical issues. This is because the hierarchical church's theology is expressed in, and through, its organization.²⁷¹ The hierarchical church acts as one body in the world, with Christ as its ultimate head. Each congregation is part of the church universal and is united by a common creed, a common liturgy, and a "communal" understanding of each congregation's dependence upon one another. There are no "lone ranger" congregations in the hierarchical church. "The overriding principle which

270. *Id.* at 319, para. XXXVII.

271. For the hierarchical church, "[c]anon discipline guarantees the unity of the symbols of faith . . . [and] teaches individual Christians and churches that they must overcome the temptation of individualism and that fidelity to communion is essential for the self-realization of the Church." EUGENE CORECCO, *THE THEOLOGY OF CANON LAW: A METHODOLOGICAL QUESTION* 3 (Francesco Turvasi trans., 1992).

emerges in the laws of all churches of the Anglican Communion²⁷² is that ecclesiastical authorities, not individual congregations, are the stewards of church property.”²⁷³

The Protestant Episcopal Church in the United States of America has a body of laws to resolve church property matters.²⁷⁴ Those laws reflect the church’s view that each congregation is a missionary outpost for the mother church, the diocese, and that each priest in the diocese is acting solely on the bishop’s behalf.²⁷⁵ The bishop is the true pastor, and the priest assists him by preaching and caring for the church in his absence because, as a practical matter, the bishop cannot be present at all churches at the same time. Church property does not belong to the individual members of a local congregation.²⁷⁶ Episcopal Church property belongs to the people of the diocese and the national church. According to Episcopal theology, the National Church and local diocese are stewards only of what ultimately belongs to God.

The members of a hierarchical church have also voluntarily accepted the benefits of association with their parent organization. Local congregations should not be allowed to later disavow the association in order to avoid accepted and known consequences. Moreover, members and priests of the Episcopal Church have power to adopt, amend, and repeal laws that govern the disposition of church property. This is all the more reason why civil courts should not impose their own ideas of what is a “fair” or just disposition of church property.

Finally, the Georgetown judge’s reliance on a newly discovered 1745 Deed alone, without examining the laws governing church property at the time, was plainly erroneous. Neutral principles of law analysis requires civil courts to examine all documents governing the disposition of church property before rendering a decision. Those documents include church constitutions and laws, statutes governing church property at the time of the disposition, and documents indicating the local church’s relationship to its parent organization.

The evidence is clear. The 1745 Trust Deed vested no private rights of ownership in George Pawley or William Poole. Therefore, no rights could have passed under the 1745 Trust Deed to George Pawley’s heirs. All Saints property is, and has been for nearly two hundred years, held in express and implied trust for the benefit of the Diocese of South Carolina and the National Church. The Diocese and the National Church, contrary to the All Saints Order, hold legal title to the All Saints property. The Order should be reversed accordingly. No other result appears permissible under all laws—constitutional, statutory, common and ecclesiastical.

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272. The Anglican Communion includes the National Church.

273. DOE, *supra* note 138, at 337.

274. CONSTITUTION & CANONS 2000, *supra* note 6.

275. *Id.*

276. *Id.*

